



State of Idaho
DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Statehouse Mail, Boise, Idaho 83720 - (208) 334-7900

CECIL D. ANDRUS
GOVERNOR
R. KEITH HIGGINSON
DIRECTOR

November 10, 1988

RE: POLICY AND IMPLEMENTATION PLAN FOR PROCESSING WATER RIGHT
FILINGS IN THE SWAN FALLS TRUST WATER AREA

Dear Interested Party:

On November 3, 1988, the Director of the Department of Water Resources (IDWR) issued the above referenced policy and implementation plan (plan), a copy of which is enclosed with this letter.

The plan has been changed from the prior draft policy as a result of comment received at public information meetings held in early October 1988.

Principal changes to the plan include provision for the prior promulgation of rules and regulations in connection with annual water use fees and in limiting applications and permits to a specific term.

The pending petitions of the Twin Falls Canal Company, North Side Canal Company and American Falls Reservoir District which seek the expansion of Water District No. 1 by inclusion of ground water in the non-trust water area and a moratorium imposed on the non-trust water area will be heard in a separate forum and not treated in the plan. IDWR has scheduled public information meetings in connection with the petitions as follows:

December 6, 1988 - Idaho Falls - 7:00 p.m.
December 7, 1988 - Pocatello - 10:00 a.m.
December 7, 1988 - Twin Falls - 7:00 p.m.

The specific meeting place in each of the cities has not yet been determined. Subsequent press releases and a legal notice will provide more information on the scheduled meetings.

After the public information meetings, the department will conduct a pre-hearing conference on January 31, 1989 in Pocatello at a location yet to be determined.

IDWR currently is sorting and compiling the backlog of applications and permits in the trust water area for appropriate action in compliance with the plan, existing statutes and rules and regulations.

Additional copies of the plan are available upon request from IDWR.

Sincerely,

A handwritten signature in cursive script that reads "L. Glen Saxton". The signature is written in dark ink and is positioned above the printed name and title.

L. GLEN SAXTON, Chief
Water Allocation Bureau

Encl: 1

ISSUED NOVEMBER 3, 1988

POLICY AND IMPLEMENTATION PLAN FOR PROCESSING
WATER RIGHT FILINGS IN THE SWAN FALLS AREA

I. PURPOSE

The Department of Water Resources (IDWR) is now prepared to process a backlog of filings which seek the right to use water in the Snake River Basin upstream from Swan Falls Dam. Consideration of these filings has been delayed by the Swan Falls controversy, but with the Swan Falls Agreement now fully effective the processing of the filings can begin. The policy and implementation plan addresses the complex water allocation matters in the Swan Falls area. It applies only to the Snake River Basin upstream from Swan Falls Dam and is not applicable to other areas of the state.

The plan itself is not being promulgated as a rule and regulation, and IDWR will not use it as a basis for decision making on individual filings. However, rules will be promulgated as identified in the policy where necessary to implement policies affecting classes of filings in accordance with existing law. Action taken on a particular filing will be subject to due process procedures.

II. BACKGROUND AND PRESENT STATUS

Immediately after the Swan Falls decision was issued by the Idaho Supreme Court on November 19, 1982, IDWR imposed a de facto moratorium on approval of new consumptive uses of water in the Snake River Basin upstream from Swan Falls Dam (Fig. 1). Permits were issued only for uses considered non-consumptive (fish propagation, hydropower, heating and cooling) or determined to be non-tributary to the Snake River. Filings seeking consumptive use of water were held without action under the moratorium and enlarged an existing backlog of applications and undeveloped permits primarily associated with Desert Land Entry, Carey Act, and Bureau of Reclamation projects. Idaho's statutes allow an approved water permit to remain valid though undeveloped and unused if the project is delayed by litigation or other matters outside of the permit holder's control. Unapproved applications which have not been processed for reasons outside of the applicant's control do not have a time limit. Thus, a significant backlog of filings now await a ruling as to whether development and beneficial use may occur.

Resolution of the Swan Falls controversy produced an agreement, a contract, statutory changes, water plan policy changes and new rules and regulations, all of which provide guidance for the administration of water rights in the area of the Snake River Basin upstream from Swan Falls Dam. An immediate effect of the signing on October 25, 1984 of the contract authorized by Senate Bill 1180 of the 1983

legislative session (hereinafter S1180 contract), was that filings for domestic, commercial, municipal and industrial purposes (DCMI) could again be processed and approved. DCMI filings are limited to two (2) acre feet/day depletion and irrigation associated with domestic filings is limited to two and one-half acres. Processing and approval of such DCMI applications is continuing without regard to the backlog of other pending filings.

The Swan Falls Agreement, signed the same day as the S1180 contract, provides the basis for allowing additional consumptive use of water in the Snake River Basin, but the agreement required action by the legislature and certain agencies for it to become fully effective. On March 25, 1988, the Federal Energy Regulatory Commission (FERC) issued an order satisfying the last condition to make the Swan Falls Agreement effective after 60 days (May 24, 1988). IDWR is now able to use the provisions of the agreement and implementing legislation and rules which remove certain filings from the controversy and allow controlled processing of the other filings.

On January 13, 1988, three water delivery organizations filed a petition with IDWR seeking the enlargement of state Water District No. 1 (Upper Snake River and tributaries) to incorporate ground water tributary to the Snake River upstream from Milner Dam into the water district. On March 10, 1988, IDWR received a petition from the same organizations, seeking as an alternative to the first petition, a moratorium on the issuance of any additional permits or further development of existing permits to appropriate ground water from certain areas tributary to the Snake River upstream from Milner Dam. The purpose of the petitions is to protect existing rights to the flow of Snake River diverting at and upstream from Milner Dam from depletions caused by pumping of ground water.

The number of applications and permits presently included in the backlog is approximately 3,800. Of these filings, approximately 1,450 are permits for which development was completed and proof of beneficial use was filed prior to July 1, 1985. These developed uses meet the conditions of section 42-203D, Idaho Code, and do not require further review to be recognized as valid rights. Of the remaining filings (applications and permits for which proof of beneficial use was not filed prior to July 1, 1985) about 900 are seeking water from sources tributary to the Snake River upstream from Milner Dam and about 1,450 are seeking water from sources tributary between Milner Dam and Swan Falls Dam.

III. PROVISIONS OF THE SWAN FALLS SETTLEMENT AND IMPLEMENTING STATUTES AND REGULATIONS WHICH DIRECT IDWR'S ACTION ON THE BACKLOG OF FILINGS

Provisions of the S1180 contract include:

1. A provision subordinating Idaho Power Company's (IPCo) hydropower water rights to all uses developed prior to November 19,

1982 for which a valid license, permit or claim existed on November 19, 1982 and allowing such uses to continue without further protest from IPCo.

2. A provision subordinating IPCo's hydropower water rights to all projects for which a "substantial investment" (\$15,000 or 25% of project costs) had been made in wells and equipment by November 19, 1982, and for which a valid application or permit existed on November 19, 1982, and allowing development and use of such projects to continue without protest from IPCo.

3. A provision subordinating IPCo's hydropower water rights to all DCMI uses, both existing and future, and allowing such uses to continue without protest from IPCo unless the use would interfere with the established minimum flows.

Provisions of the Swan Falls Agreement include:

1. A provision recognizing the Snake River above Swan Falls Dam as fully appropriated as necessary to enforce the State Water Plan. Although the flow of the Snake River during high flow events does exceed the rate of flow for existing rights, including IPCo's hydropower rights in the Milner to Swan Falls Dam reach, the dependable flow in this reach is fully appropriated.

2. A provision providing minimum stream flows of 3,900 cfs during the irrigation season and 5,600 cfs during the non-irrigation season at the Murphy, Idaho U.S.G.S. gauging station located near the Swan Falls Dam site.

3. A provision placing in trust with the state IPCo's water rights in excess of the guaranteed minimum flows.

4. A provision allowing re-allocation of the water held in trust (trust water) when in the "public interest" and adding a definition of public interest requiring, among other considerations, the determination of the effect upon electric utility rates.

5. A provision subordinating IPCo's water rights to beneficial uses of water made prior to October 1, 1984 for which a valid application or claim was filed by June 30, 1985.

6. A provision recognizing IPCo's rights, up to the amount needed to supply the established minimum flow at the Murphy gauging station, as unsubordinated and fully protectable.

IDWR's management of the trust water must comply with the following provisions of the state statutes, adopted rules, and the State Water Plan:

1. Trust water in the Snake River Basin is established by section 42-203B, Idaho Code. It is to be managed:

a. To protect the right of the hydropower user to use the water pending approval of depletionary beneficial uses in accordance with state law;

b. To assure an adequate supply for all future beneficial uses; and,

c. For the use and benefit of the people of the state of Idaho.

2. Definition and location of trust water:

a. "Trust water" is that portion of a water right used for hydropower generation purposes which is in excess of a minimum stream flow established by state action. (Water Appropriation Rule 2,17. -- See Figure 2 & Figure 3 Hydrograph of flows at Bliss Dam and at Murphy, respectively).

b. Trust water flows under the Swan Falls Agreement are located in the Snake River between Swan Falls Dam and Milner Dam, including all surface and ground water sources tributary to the Snake River in that reach - (Water Appropriation Rule 1,5,1,1.). See Figure 1 for the location of ground water presumed to be subject to trust water provisions.

c. Surface and ground water flows tributary to Snake River upstream from Milner Dam are not considered to be subject to the trust water provisions. (42-203B, Idaho Code, and Water Appropriation Rule 1,5,3,5.).

3. Reallocation of trust water is pursuant to state law:

a. First in time is first in right (section 42-106, Idaho Code) and priority of appropriation is determined by the date of receipt of an application to appropriate (Water Appropriation Rule 3,2,2.).

b. Appropriation must be accomplished under the application, permit and license system (section 42-201, Idaho Code and Water Appropriation Rule 3,1,1.).

c. Applications to appropriate trust water are subject to the public notice, protest, and hearing procedures (Water Appropriation Rule 4,2.).

d. Undeveloped permits which will use trust water are subject to reprocessing (section 42-203D, Idaho Code).

e. Filings appropriating trust water must satisfy the criteria of section 42-203A, Idaho Code, which require an assessment of the impact of the proposed use on water available for existing water rights, the adequacy of the water supply for the proposed use, whether the application is filed for speculative purposes, the financial ability

of the applicant to complete the project, and the effect of the proposed use on the local public interest. (Water Appropriation Rule 1,4,1.).

f. Filings appropriating trust water which will result in a significant reduction in flows available to hydropower rights require that the Director also consider additional public interest criteria. The Director shall consider and balance the relative benefits and detriments for each factor required to be weighed under section 42-203C(2), Idaho Code, to determine whether a proposed reduction of the amount of water available for power production serves the greater public interest. The Director shall evaluate whether the proposed use sought in the permit being reprocessed or the application will provide the "greater" benefit to the people of the state of Idaho when balanced against other uses for the same water resource. Water Appropriation Rule 5,3. provides guidelines for evaluating public interest relative to appropriation of trust water and Water Appropriation Rule 5,2. provides guidelines for determining whether the project under consideration will cause a significant reduction in flows available to hydropower rights.

g. Permits reallocating trust water must be conditioned to protect existing uses, established minimum stream flows, and the public interest. To insure that these factors are protected, the Director may condition permits to insure compliance with the provisions of Title 42, Chapter 2, Idaho Code, other statutory duties, the public interest, and the promotion of efficient use and conservation of energy and water (Water Appropriation Rule 6,1. and Rule 6,10.). Permits reprocessed pursuant to section 42-203D, Idaho Code, may be cancelled, modified or conditioned by the Director to make the permit comply in every way with any permit that would be issued for the same purpose based upon a new application processed under these rules (Water Appropriation Rule 6,6.).

h. Policy 5C of the State Water Plan reserves 150 cfs (approximately 108,600 acre-feet/year) of water for consumptive use of future DCMI needs.

i. As a condition of processing applications or reprocessing permits to reallocate trust water, the Director may require a cash bond or surety bond. Such bond, up to five dollars (\$5.00) per acre of land requested to be irrigated or \$250 per cfs for other uses, shall serve as a performance bond for satisfactory compliance with the permitted time requirements for commencement of construction, completion of project works and diversion of water to beneficial use. (Water Appropriation Rule 4,1,5.).

j. The Director is authorized by section 42-1805(7), Idaho Code, and Water Appropriation Rule 7 to implement a moratorium on the issuance of permits or the continued development of existing permits if necessary to protect existing water rights and established minimum stream flows or to ensure compliance with the provisions of Chapter 2, Title 42, Idaho Code.

IV. POLICY

Following the legal requirements described in section III above, IDWR's actions in allocating the water of the Snake River Basin upstream from Swan Falls Dam will advance and be guided by the following policies:

1. Provide protection for all valid, existing water rights including established minimum stream flows;
2. Protect the value, economic and otherwise, of the asset (trust water) obtained by the people of Idaho in the Swan Falls Agreement;
3. Make water available for additional development found to be in the public interest;
4. Encourage efficient use of trust water supplies;
5. Provide orderly processing of the backlog of applications and undeveloped permits while recognizing and protecting the priority date of the filings and still allowing for the processing of filings requiring immediate action;
6. Assure that those directly benefiting from the use of trust water support financially any necessary costs to the state of meeting commitments of the state which enable use of the trust water; and,
7. Provide opportunity for the public and holders of water rights to participate in water management decisions.

Discussion

When the existing hydropower rights are considered, the Upper Snake River Basin is essentially fully appropriated. IPCo's water rights placed in trust and held by the state are a valuable asset in economic and other terms. The state has a responsibility to determine whether this asset provides the greater benefit to the people of Idaho as a source of flow for hydropower and other instream uses, or for upstream consumptive economic development. In either case the trust water resource must be managed on a continuing basis. This continuing management can be assured by issuing permits for the use of the trust water for specific terms long enough to amortize the development investment. The priority of the filing would not be lost at the end of the term, but in reprocessing, the public interest would be re-evaluated and the adequacy of the water supply would be considered. If filings with earlier priority dates are subsequently processed, approved, and developed which require the water which has been used by the filing being re-evaluated or the project no longer meets the public interest criteria, the filing would not be continued.

Permits authorizing development of trust water must give the state the capability to insure that the established minimum stream flows can be maintained and other senior water rights using the Snake River can

be protected. Many of the pending applications and undeveloped permits seeking trust water propose to use wells drilled into the eastern Snake Plain Aquifer. The traditional method of stopping or cutting back the use of junior rights during times of scarcity is not adequate to guarantee that senior flow rights or minimum stream flows in the Snake River will be met. Curtailment of junior ground water pumping rights is inadequate to protect senior Snake River flow rights because of the time delay between reduced ground water pumping and the effect reaching the Snake River. Because curtailment of ground water pumping during a given year will not be effective, a source of water is needed in the upper Snake River Basin to supply water to the river during periods of low flow at the Murphy gauging station. Those using trust water for consumptive uses must be responsible for insuring that the replacement water source is available when needed. A fee based upon the volume of trust water depleted is needed to provide funding to purchase or contract for a source of water to maintain the required minimum instream flows.

The Water District 01 water bank rents water at an annual lease rate which has been set at \$2.50 per acre foot for the past several years. An annual fee for use of trust water at the same rate as that charged by the Water District 01 water bank is proposed. All fees received will be deposited in the Water Management Account created by section 42-1760, Idaho Code, for use by the Water Resource Board to obtain a replacement water supply through lease or purchase of existing storage or construction of new storage.

The criteria and procedures for determining and implementing term review conditions and an annual fee for use of trust water will be provided in rules and regulations adopted pursuant to the director's authority under Section 42-1805(8), Idaho Code.

The order of processing of filings is another important consideration. It appears that sequential processing of the filings based solely upon priority date will focus IDWR's effort on filings not now demanding attention or ripe for action and will delay consideration of filings with later priority dates for which a more pressing need and preparedness to proceed may exist. Many of the earliest priority filings in the backlog seek water (now trust water) for Carey Act or Desert Land Entry projects for which the availability of the land has not been established. Some of the later filings in the backlog seek validation of existing irrigation projects developed subsequent to enactment of the mandatory permit requirement. Without prompt consideration of the filings, these projects will either have to acquire and transfer existing water rights or be required to stop use of the water. Other existing projects propose changes from one source of water to another (i.e., surface water to ground water) or seek supplemental supplies for lands already irrigated. Because water in Idaho, including trust water, is allocated under the appropriation doctrine, the priority date of the pending filings cannot be ignored since the supply of trust water to be reallocated is limited.

IDWR proposes to process some filings out of sequence in order to give timely consideration to filings for development existing prior to October 1, 1984 and to projects which will not deplete trust water. Permits issued may be conditioned to require review after a specific term of years to assure that a source of water will be available to the state to assure that the established instream flows can always be guaranteed. The following categories will be used to guide the order of processing of filings in the area upstream from Swan Falls Dam:

1. Filings seeking water tributary to Snake River upstream from Milner Dam (non-trust water area) are administered separately from water rights in the trust water area and will not be processed in sequence with filings in the trust water area. The department's action on the petitions seeking to enlarge Water District 01 and seeking a moratorium on ground water pumping in part of the trust water area will determine the timing of action on filings in the non-trust water area.

2. Filings seeking water in the trust water area for DCMI purposes have been given a separate allocation and will not be processed in sequence with other trust water filings. Because Water Plan Policy 5C reserves water for all domestic, commercial, municipal and industrial uses without reference to size, filings larger than 2 A-F/day depletion limit can be processed without regard for sequence of filings but the criteria of 42-203C, Idaho Code, must be considered.

3. Applications for water in the trust water area for which IPCo's water rights have been subordinated by the Swan Falls Agreement (development completed prior to October 1, 1984 and application filed prior to July 1, 1985) are not subject to the staged development policy of Section 42-203C, Idaho Code, which limits irrigation development using trust water to twenty thousand (20,000) acres per year or eighty thousand (80,000) acres in any four year period (hereafter termed the "20,000 acres/yr limitation"). These filings will not be processed in sequence with other trust water filings because the effect of these filings on hydropower flows has already occurred and because, due to subordination, the filings are not taking water held in trust.

4. Applications filed after July 1, 1985 to validate water use in the trust water area for projects which were developed prior to October 1, 1984 will also not be processed in sequence with other filings for trust water. The depletion caused by such projects is assumed to have already occurred and need not be counted against the 20,000 acres/yr limitation for the year in which the processing occurred, but all other public interest requirements of 42-203C, Idaho Code, must be evaluated.

5. Applications proposing projects which will not increase the depletion of trust water will not be processed in sequence with other filings for trust water. These projects, which include those for

non-consumptive uses and those for developments existing prior to October 1, 1984 for which a water right from a different or supplemental supply is sought, where both the original and new sources are trust water, will be assumed not to require consideration under the 20,000 acres/yr limitation.

6. All other filings, whether in application or permit stage, whether for a yet to be developed project or for one completed after October 1, 1984, and whether for use on private land or for development of federal desert land, will be processed as nearly as practicable in sequence of the filing date.

IDWR will hold a hearing or hearings as necessary to evaluate the petition to enlarge Water District 01 and the petition to establish a moratorium on further ground water development in certain areas of the non-trust water area. Notice of the hearings will be given to allow participation by all concerned citizens.

A moratorium will be entered to prohibit further expansion or development of existing permits for consumptive purposes in the trust water area until the reprocessing required by section 42-203D, Idaho Code, is completed for a permit. Requests for amendment or extensions of time will be considered in conjunction with reprocessing of the permit.

V. IMPLEMENTATION PLAN

As a general requirement, all applications and undeveloped permits in the Snake River Basin upstream from Swan Falls Dam are to be processed under the provisions for reallocating trust water. This general requirement is modified by various provisions of the S1180 contract, the Swan Falls Agreement, statutes and IDWR's rules which serve to exempt certain filings from the full requirements for reallocating trust water. These provisions are summarized in Table 1 categorized by the nature of the review and evaluation (processing) necessary to determine if the water development can be allowed to proceed. The rationale for assigning a filing to a particular category is referenced in the footnotes to the table. A brief discussion of the nature of the filings in each column follows:

Columns 1 & 2 - "No Processing Required" - Included in this grouping are existing permits from non-trust water sources and certain permits from trust water sources for which IPCo has subordinated its prior hydropower water rights.

A moratorium on development of ground water tributary upstream from Milner Dam, if ordered as proposed in the petition, would cause permits, to the extent development is not complete to be categorized under column 3 requiring reprocessing or column 9 to delay or reject the filing rather than under column 1.

Filings listed in column 2 of Table 1 will not receive further review to determine if the water development can remain or continue and, therefore, further public notice will not be given concerning water rights for these filings. Proof of beneficial use has been submitted on most of the permits included in the categories of columns 1 & 2 or an extension of time has been requested. Extensions may be granted based upon delay because of the Swan Falls litigation or as otherwise provided by section 42-204, Idaho Code. Any extensions allowed will be of short duration not exceeding one construction and use season unless unusual circumstances are demonstrated.

Columns 3 & 4 - "Only 42-203A Processing" - Included in this grouping are all applications seeking water for any purpose from non-trust water sources and various categories of applications seeking water from a trust water source to which Idaho Power Company has subordinated its prior hydropower water rights.

Applications in columns 3 & 4 will be processed sequentially unless processing of a particular filing is delayed by reasons beyond the applicant's control, such as obtaining a right of way, DLE entry or Carey Act entry. However, the holders of such applications will be required to submit evidence that they continue to have an interest in the proposed project and that there is a reasonable expectation that the project may receive the necessary approval from the Bureau of Land Management. Without such evidence the applications will be rejected. Processing will proceed expeditiously without regard to the 20,000 acres per year limitation (which applies only to trust water sources), unless delayed by public interest related reasons.

Public notice of any processing will be given as provided in Water Appropriation Rule 4,2. Rule 4,2. does not require readvertisement of applications diverting from the non-trust water area. However, if a moratorium is imposed as requested in the petition, readvertisement of the pending applications under Column 3 proposing a consumptive use of water could be required or the filings could be held or rejected (Col. 9). The Director is required to apply the five criteria of 42-203A, Idaho Code, to an application for permit, whether protested or unprotested, and if necessary the Director may hold fact-finding hearings or use other procedures to obtain the information necessary to act on an application.

Applications proposing use of trust water categorized under Column 4 will be, if approved, conditioned to require an annual use fee and a term review, unless IPCo's hydropower rights have been subordinated to the filing and it was released from Ada County Case #81375.

Column 6 - "Only 42-203C Processing" - Included in this column are existing permits proposing consumptive use of trust water which are required to be reprocessed pursuant to section 42-203D, Idaho Code. Such filings have already been evaluated against the five (5) criteria of 42-203A, Idaho Code. Water Appropriation Rule 4,2,3,1 provides for evaluation only under the five public interest criteria of 42-203C(2),

Idaho Code. Public notice will be given prior to the IDWR reprocessing any permit in the category under column 6.

Applications in column 8 will be processed in sequence with the existing permits listed in column 6, but will also require review under the criteria of 42-203A, Idaho Code. Filings in both columns are subject to the 20,000 acres/year limitation except that applications filed after July 1, 1985 for development completed prior to October 8, 1984 will not be included in the 20,000 acres/yr limitation. These projects meet the physical requirements to have IPCo's hydropower rights subordinated to them, and the depletion in flow to the hydropower rights began to occur in previous years. This policy allows unauthorized developments in place at the time of the signing of the Swan Falls Agreement to be reviewed outside of the sequential processing based upon priority date. Unauthorized developments made after October 1, 1984 will be processed in sequence and will be included in the 20,000 acres/year limitation.

Applications and reprocessed permits for trust water receiving approval will be conditioned to require that:

- a. Proof of beneficial use will be due in a relatively short time period (not more than one construction and beneficial use season except in unusual circumstances).
- b. The permit will be re-evaluated after a specific term of years if in the trust water area.
- c. An annual use fee shall be paid if in the trust water area as needed to insure maintenance of instream flows.
- d. Surrender of permit and cessation of diversion if conditions of approval are not complied with.

Column 9 - "Delay Processing or Reject Filings" - Filings in this category will be denied if in a critical ground water area, held pending submittal of information needed to demonstrate that water is available, if in a ground water management area, or processed in accordance with the terms of a management order entered in compliance with the Administrative Procedures Act.

VI. IDWR ACTIONS TO IMPLEMENT THE PLAN

1. A data sheet will be prepared for each filing to categorize the filing and to guide processing. The data sheet should be completed to the extent possible from existing information in IDWR files. The computer will be used to compile and/or maintain this information as determined necessary. Supplemental information, when needed, will be obtained from the applicant/permittee using a questionnaire. Information sought may include:

- a. Continued interest in project development.

- b. Status of any needed federal project approval
 - c. Status of development including dates of starting construction, completing construction, first beneficial use and ultimate beneficial use.
 - d. Planned development schedule.
 - e. Type of use, i.e, new development, supplemental, or replacement.
 - f. Acknowledgement that an annual fee for use of the trust water will be a condition of any permit to use trust water.
- 2. Compile pending filings based upon the level of processing required under the terms of the Swan Falls Agreement, the Idaho Code and the Water Appropriation Rules and Regulations. Table 1 shows processing requirements for filings based on the characteristics of the filings.
 - 3. Notify holders of applications and permits and others requesting to be informed of the category to which a filing is assigned.
 - 4. Begin processing in accordance with the adopted Policy and Implementation Plan.

TABLE 1 - PROCESSING¹ REQUIREMENTS
BASED UPON CHARACTERISTICS OF FILINGS

No Processing Required	Only 42-203A Processing		Only 42-203C Processing		Both 42-203A & 42-203C Processing		Delay Processing or Reject Filings	
Column 1 Non-Trust Water	Column 2 Trust ² Water	Column 3 Non-Trust Water	Column 4 Trust Water	Column 5 Non-Trust Water	Column 6 Trust Water	Column 7 Non-Trust Water	Column 8 Trust Water	Column 9 Either Trust or Non-Trust Water
Any existing permit	Permits to develop ⁴ new storage <u>permits</u> issued prior to 7/1/85 for which development was complete prior to 7/1/85 ⁵ <u>permits which</u> have been released from Ada County Case #81375 because a significant investment was made prior to 11/19/82. ⁶	All applications seeking water for any ⁷ purpose	Any application proposing ⁸ only DCMI or non- consumptive uses or only ⁴ new storage <u>Applications &</u> existing permits presumed not to cause a signif- ⁹ icant reduction <u>Applications</u> filed prior to 11/19/82 which have been released from Ada County Case #81375 because a signif- icant investment was made prior to 11/19/82. ¹⁰ <u>Applications filed</u> prior to 7/1/85 for beneficial use made prior to 10/1/84. ¹¹	Not applicable to any filing	Any existing permit not described by Col. 2 or 4 ⁴ <u>Any non-</u> DCMI existing permit for a new consumptive use processed in a year during which in excess of 20,000 AF/yr depletion ¹³ approved.	Not applicable to any filing	Any application not described by Col. 2. or 4. ⁴ <u>Any non-</u> DCMI appli- cation for a new consumptive use processed in a year during which in excess of 20,000 AF/yr depletion ¹³ approved.	Filings with points of diversion located in a ground water management area or a critical groundwater area

Footnotes to Table 1

1. Processing as used in this table refers to review and evaluation to determine if water development should be permitted. Public notice is an essential part of processing. Actions to extend the time in which to submit proof of beneficial use or to confirm a water right by issuing a license are outside the scope of the term "processing" as used in this table.
2. Non-trust water and trust water as column headings refer to the location of the point of diversion relative to whether the water, if not diverted, would be tributary to Snake River upstream from Milner Dam (non-trust water) or between Milner Dam and Swan Falls Dam (trust water). The area within which ground water is considered to be trust water is shown on figure 1.
3. The rationale for not requiring processing is based upon 42-203B(2), Idaho Code, which separates water tributary upstream from Milner from trust water. As permits, these filings have previously been determined to meet 42-203A, Idaho Code criteria. Entry of a moratorium order as petitioned, would put existing permits, to the extent development is not complete into Column No. 3 for reprocessing or into Column No. 9 for delay or rejection.
4. Water Appropriation Rule 5,3,7. presumes new storage upstream from Swan Falls Dam to be in the public interest until studies are complete (Reference Policy 5I, adopted State Water Plan).
5. Section 42-203D, Idaho Code exempts these permits from reprocessing. Water Appropriation Rule 4,2,3,1. clarifies that such filings are not subject to reprocessing under the 42-203A, Idaho Code criteria.
6. Article 2.(d) of S1180 Contract subordinates IPCo's rights to these permits which already have been evaluated against the criteria of 42-203A, Idaho Code, and have been released from the Swan Falls lawsuit.
7. Entry of a moratorium order, as requested in pending petitions, would either require readvertisement of pending applications or move the filings to Column 9 for delay or rejection.
8. Article 2.(a) of S1180 Contract subordinates IPCo's rights to DCMI filings and Water Appropriation Rule 5,2,4. creates a presumption that flows available to hydropower will not be significantly reduced.
9. Water Appropriation Rule 5,2. provides criteria for determining which applications will not create a significant reduction in flows to hydropower rights. No more than 20,000 AF/yr of depletion may be authorized for these filings.
10. Article 2.(a) of S1180 contract subordinates IPCo's rights to permits in this category, however, applications in this category have not been evaluated against criteria of 42-203A, Idaho Code.

11. Paragraph 7.D. of Swan Falls Agreement subordinates IPCo's rights to these applications. However, an application must still be evaluated against the criteria of 42-203A, Idaho Code.
12. Refer to 42-203C, Idaho Code, and Water Appropriation Rule 5.2. Water Appropriation Rule 4,2,3,1. limits review to 42-203C, Idaho Code, criteria only.
13. Water Appropriation Rule 5.2. limits the presumption that a development will not create a significant reduction in flows to hydropower rights to 20,000 AF/yr. Any filing processed in excess of that amount of depletion must be reviewed under the requirements of 42-203C, Idaho Code. In the instance of permits, the requirements of 42-203A, Idaho Code have already been shown to be satisfied.
14. Eight critical groundwater areas and four groundwater management areas have been designated in the Swan Falls area under sections 42-233a and 42-233b, Idaho Code.

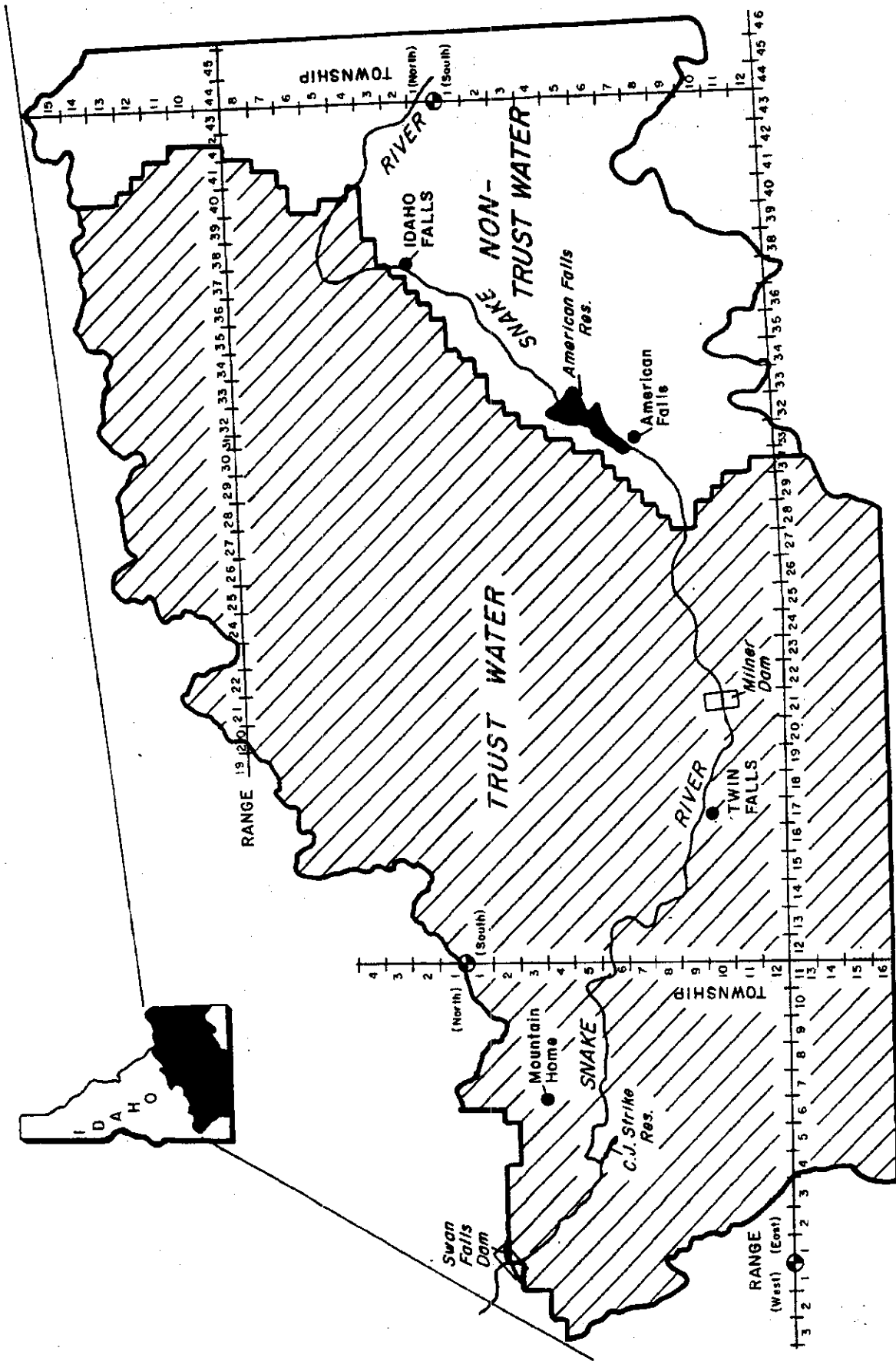


FIGURE I. -16

Figure 2

Snake River Flows

BLISS

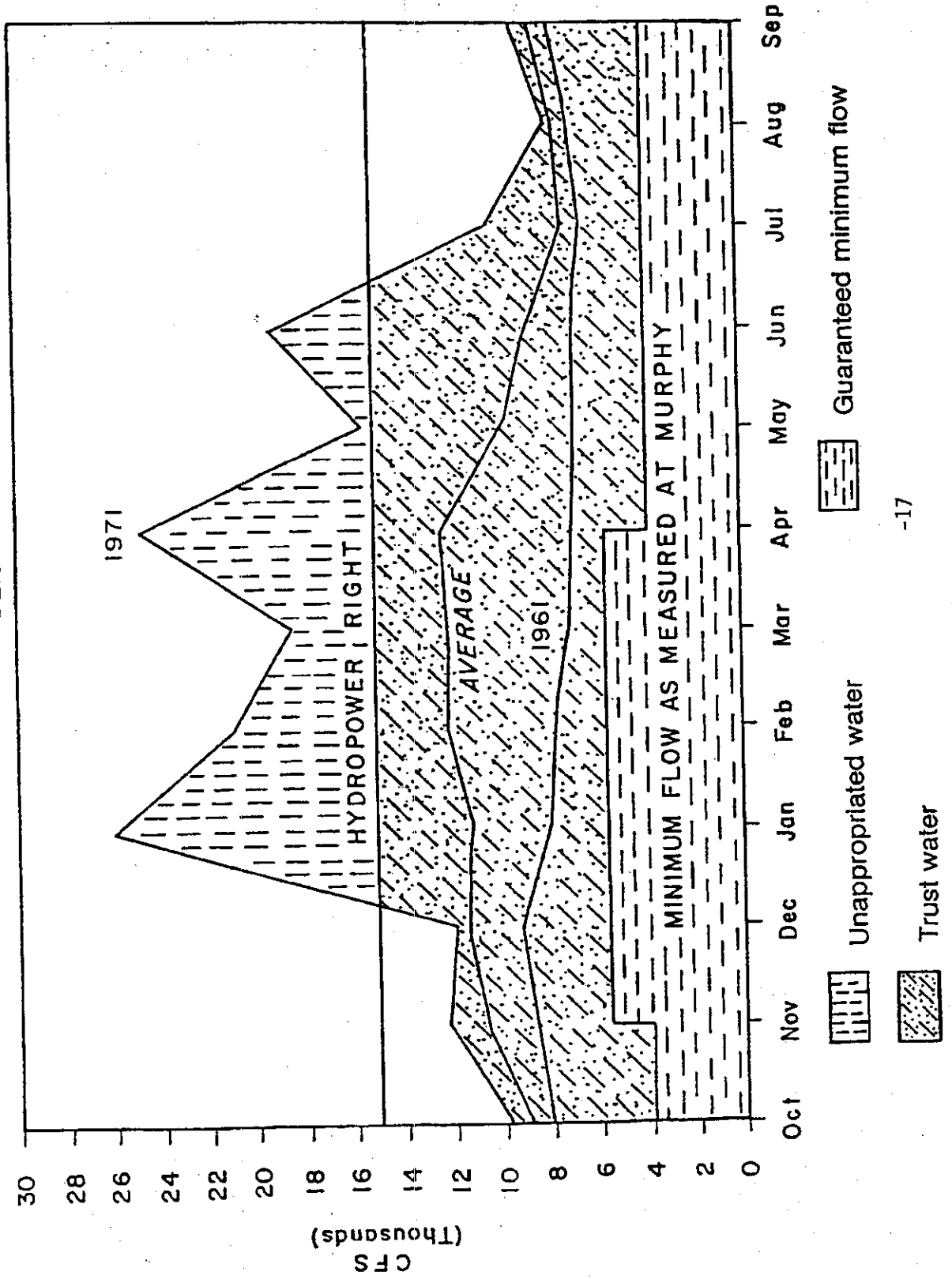
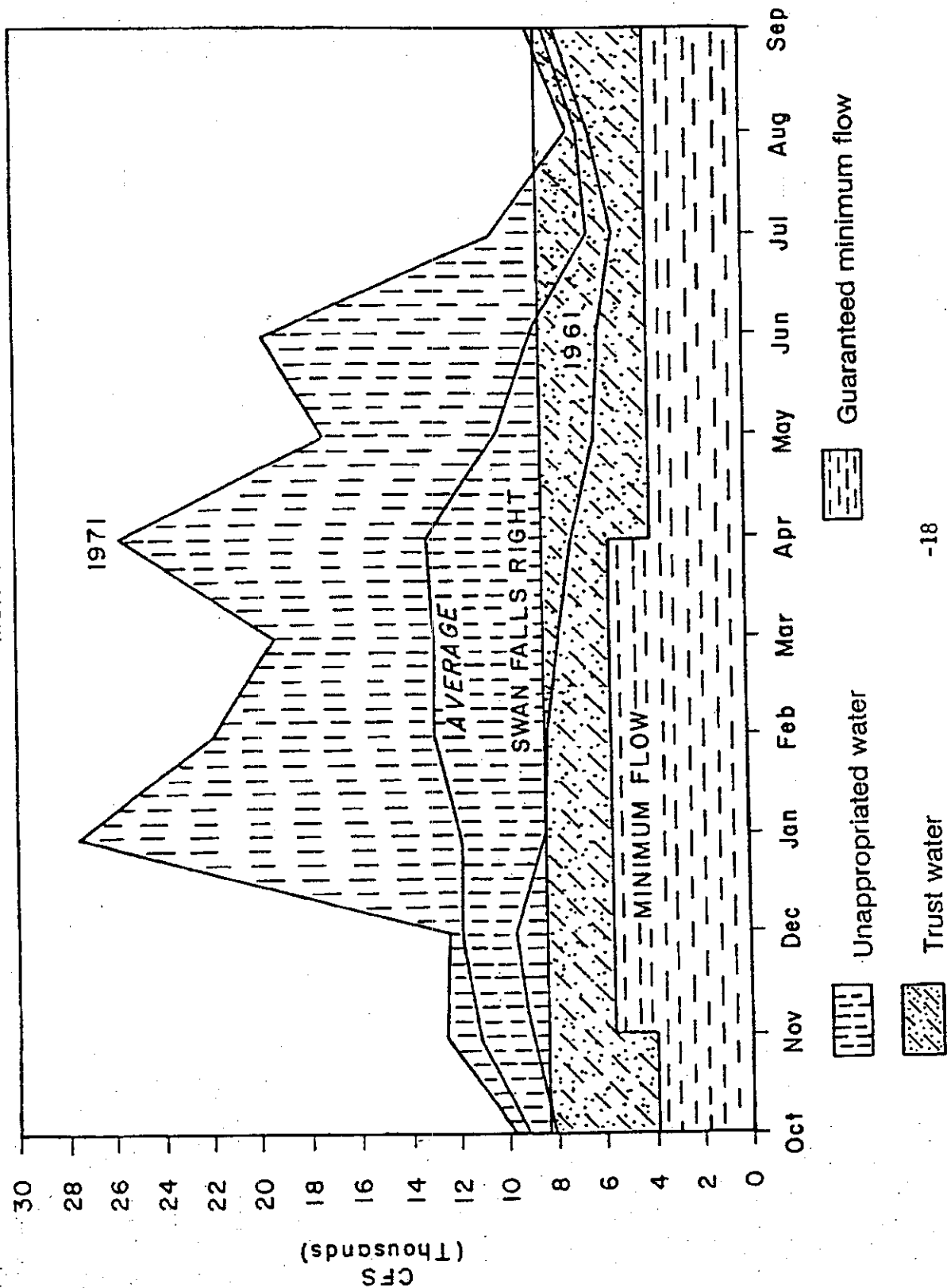


Figure 3
Snake River Flows
MURPHY



ANNOUNCEMENT OF INTENT TO WRITE AND
PROMULGATE RULES AND REGULATIONS FOR
WATER APPROPRIATION AND REQUEST FOR
PRELIMINARY COMMENT

The director of the Idaho Department of Water Resources hereby announces his intention to write and promulgate rules and regulations for the allocation of water resources in Idaho. The legislature enacted Section 42-1805(8), Idaho Code, which will be effective on July 1, 1985, imposing a duty on the director to promulgate rules and regulations implementing and effectuating the powers and duties of the department. Also, effective on July 1, 1985 are the changes to the water allocation provisions, (Section 42-203, Idaho Code) which place in trust some waters previously appropriated for hydropower generation purposes and authorize reallocation of this trust water to consumptive purposes found to be in the public interest.

The director believes that rules and regulations are needed to provide a uniform and orderly procedure for processing pending and future applications for the trust water made available and for reprocessing existing undeveloped permits under the new public interest requirements. In addition, the criteria that will be used to decide whether an application or permit subject to reprocessing will be granted need to be more fully described.

All rules and regulations will be promulgated in accordance with the Idaho Administrative Procedures Act, Title 67, Chapter 52, Idaho Code, which provides for full public participation. The director has determined that public comment is needed to provide a basis for developing the draft rules and regulations and requests public input and suggestions. The director specially requests input on the following issues:

1. What criteria should be used to determine the order of processing the backlog of pending applications and for reprocessing existing undeveloped permits?

In December, 1982 the department stopped processing applications to appropriate water for consumptive purposes proposing to use water in the Snake River drainage upstream from Swan Falls Dam. Over 1,000 applications, nearly all for irrigation purposes, are now being held. Additionally, an estimated 1,700 undeveloped permits, nearly all for irrigation purposes, propose development in this area. The Snake River Water Rights Agreement as authorized by Section 42-203B, Idaho Code, allows development in the public interest to reduce the flow of Snake River at Murphy gauge by 600 cubic feet per second (cfs) below existing low flow conditions. One hundred fifty (150) cfs of this flow is reserved for DCMI. Existing applications and undeveloped permits exceed the firm water supply available.

Should applications and permits for reallocation of trust water be processed in order of priority or should the order of processing be determined by other criteria which may be administratively more efficient, produce more immediate development, optimize the location and type of development, and distribute development?

2. What should be the requirements for the timing and scope of information to be submitted by the applicant?

The statement of legislative intent for S.B. 1008 indicates that the administrative burden of meeting the burden of proof for the public interest criteria of Section 42-203C is to be on the protestant. The applicant must, however, submit sufficient information to allow the protestant to respond to the proposed project.

Should the applicant be required to supply a detailed plan of development including operational details? Should applicants for smaller projects, unprotested applications, or projects proposing uses such as DCM be exempted from this requirement?

3. What factors are appropriate in the consideration of "local public interest"?

All applications to appropriate water must comply with the local public interest criteria of Section 42-203A, Idaho Code. The statutes define local public interest as the "affairs of the people in the area directly affected by the proposed use". Should local public interest be restricted to affects directly associated with water diversion and use such as instream values, and water quality or should it be broadly interpreted to include general land use concerns? Should downstream effects on anadromous fish and hydropower production be considered?

4. What constitutes a "significant reduction" in water available to a hydroelectric facility?

Section 42-203C, Idaho Code, requires that if an application to appropriate trust water will significantly reduce water available to a hydroelectric facility, the applications must be evaluated using public interest criteria.

What parameters should be used to evaluate a significant reduction? Should cumulative impacts be evaluated considering depletion of all trust waters down to the minimum flow or only the increment predicted to be depleted during some planning period?

Should applications proposing small diversions, or certain uses such as DCMi and those that are not protested be exempted?

5. What guidelines are needed to evaluate the "public interest" for relocating trust water?

Section 42-203C, Idaho Code, requires the director to consider five criteria to evaluate the public interest of reallocating trust water. Should rules and regulations be promulgated providing detailed guidelines for evaluating the positive and negative impacts of proposed projects on the state and local economy, on utility rates, on the family farming tradition, and on the full use of Idaho's water resources? How can remote indirect impacts be adequately evaluated? Should the value of potential future uses, which are foregone if the application is approved, be considered?

6. What rating scale should be used to balance the five public interest criteria?

Section 42-203C, Idaho Code, states that no single public interest criteria is entitled to greater weight than any other criteria. Does this require a simple check off that the proposed project complies with the criteria and that a project complying with a majority of the criteria is to be approved, or should a rating system be adopted which recognizes the degree to which a project meets a proposed criteria while still requiring the potential maximum value of each criteria to be the same?

All comments and suggestions provided pursuant to this notice will be reviewed and considered by the director in his decision of how to implement the new and amended legislation passed relative to the Swan Falls agreement.

Since the legislation is effective 7-1-1985 and the IDWR is charged with certain specific duties and responsibilities, any rules and regulations which may be adopted by the IDWR will be on an emergency basis as provided in Chapter 52, Title 67 (Administrative Procedure), Idaho Code.

Comments should be mailed to Director, Idaho Department of Water Resources, Statehouse, Boise, Idaho 83720 to be received prior to May 15, 1985.

MEMORANDUM

TO: KEITH HIGGINSON, NORM YOUNG
GLEN SAXTON & JIM JOHNSON

FROM: TIM LUKE *TL*

DATE: July 13, 1993

RE: TRUST WATER STATUS REPORT

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Attached is a copy of the June, 1993 Trust Water Status Report. The last report which I completed was in June of 1992. I have also included a copy of the 1992 report for your reference.

You will note that there has been very little activity in processing trust water applications. The lack of activity is result of moratorium areas established in 1992 and has contributed to a slight increase in backlogged filings. There were a total of 605 filings backlogged a year ago as opposed to 647 backlogged filings this year. Many of these filings were already backlogged as a result of existing moratoriums, including the Big Lost, Mud Lake and groundwater management area moratoriums.

SEAN FALLS TRUST WATER AREA STATUS REPORT
AS OF JULY 1, 1993

SUMMARY OF SEQUENTIAL PROCESSING

PROCESSING COMPLETED	1989		1990		1991		1992		1993		TOTAL		TOTAL TRUST	
	NO.	ACRES	NO.	ACRES	NO.	ACRES	NO.	ACRES	NO.	ACRES	NO.	ACRES	NO.	ACRES
1. Continuation Orders	76	13896	43	16547	1	10					120	30453	120	16143
2. Approved Apps.	12	567	107	21468	247	39692	63	6676	2	312	431	68715	431	29445
3. Cancelled/Voided/Lapsed	27	8897	39	9086	18	4022	5	1998			89	24003		
4. Relinquished/Withdrawn	17	3325	24	3911	26	3468	6	245			73	10949		
5. Exempt	69	11193	33	4245	6	731					108	16169		
Total	201	37878	246	55257	298	47923	74	8919	2	312	821	150289	551	45588

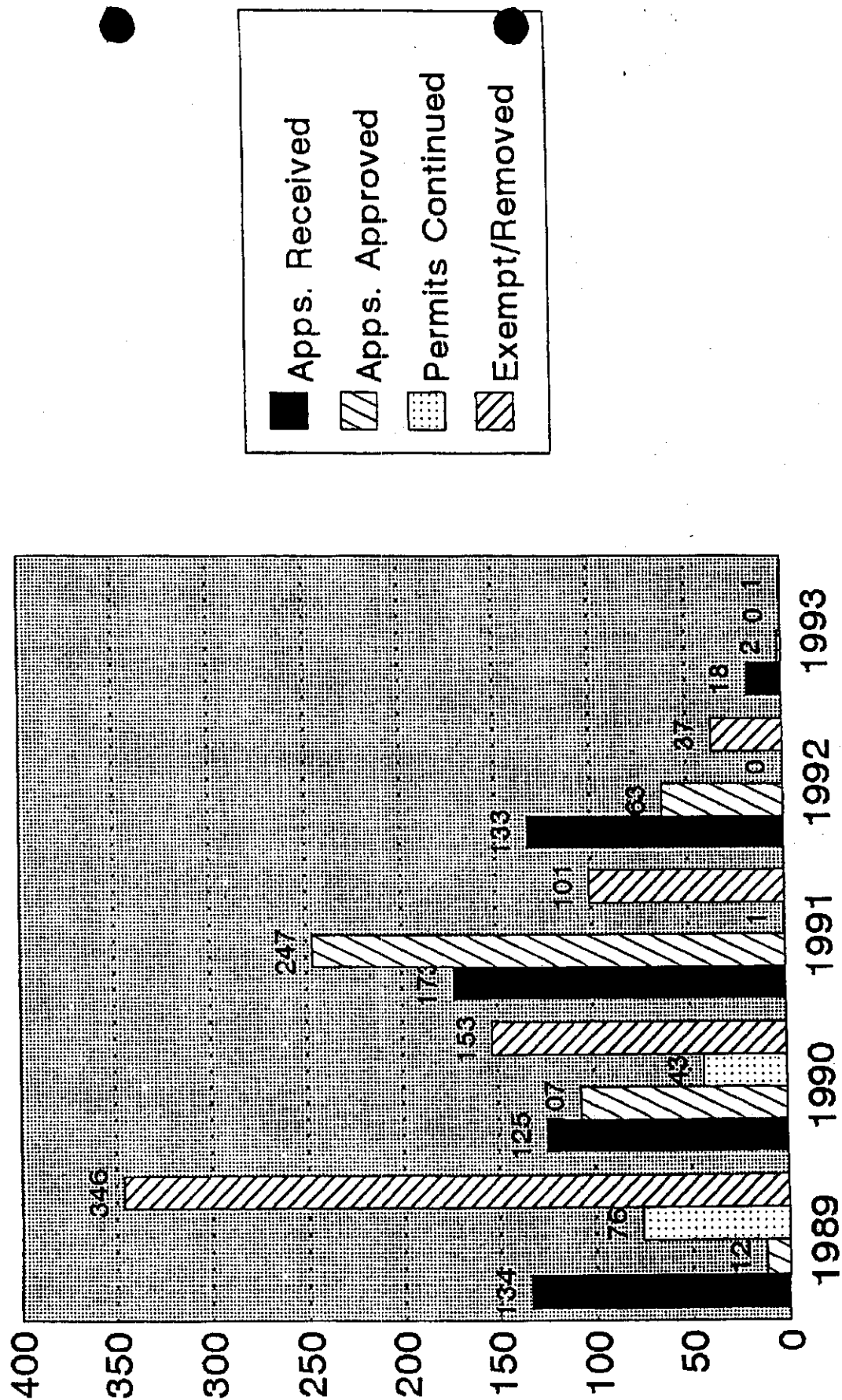
SWAN FALLS TRUST WATER REPORT
SUMMARY FROM JANUARY, 1989 THRU JUNE, 1993

CURRENT BACKLOG STATUS
AND FINAL SUMMARY

	FILINGS	ACRES
1. Total Backlog (from page 2):	647	261,370
Types of Backlogged Files:		
A. Total Protested Filings	74	47,467
B. Carey Act Filings	23	11,112
C. DLE Filings	11	80,851
D. All Moratorium Areas	539	121,940
Sub-total (A. thru B.)	647	261,370

TRUST WATER SUMMARY

APPS. APPROVED & RECEIVED, PERMITS CONTINUED
& FILINGS EXEMPT/REMOVED THRU JUNE, 1993



BEFORE THE DIRECTOR
OF THE
DEPARTMENT OF WATER RESOURCES

IN THE MATTER OF EVALUATING)
WHETHER DEVELOPMENT OF NEW)
IRRIGATED ACREAGE WILL CAUSE)
A SIGNIFICANT REDUCTION IN)
TRUST WATER AVAILABLE FOR)
POWER PRODUCTION)

MEMORANDUM DECISION
AND ORDER

This matter having come before the Director of the Idaho Department of Water Resources (IDWR) as a result of the Swan Falls water right settlement, the Director finds, concludes and orders as follows:

FINDINGS OF FACT

1. "Trust water" is that portion of an unsubordinated water right used for hydropower generation purposes which is in excess of a minimum stream flow established by state action.

2. Section 42-203C(1), Idaho Code, provides as follows:

"If an applicant intends to appropriate water which is held in trust by the state of Idaho pursuant to subsection (5) of Section 42-203B, Idaho Code, the director shall consider, prior to approving the application, the criteria established in Section 42-203A, Idaho Code, and whether the proposed use, individually or cumulatively with other existing uses, or uses reasonably likely to exist within twelve (12) months of the proposed use, would significantly reduce the amount of trust water available to the holder of the water right used for power production that is defined by agreement pursuant to subsection (5) of Section 42-203B, Idaho Code, and, if so, whether the proposed reduction is in the public interest". (emphasis added).

3. The IDWR conducted a study to estimate the reduction in hydropower generation which would result from the development of the first 20,000 acres of newly irrigated land (new development) authorized under the Swan Falls settlement. The IDWR also conducted a study which involved 196,000 acres of new development.

The studies included several steps as follows:

a) Identify the location of the potential new development

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and the related water sources;

- b) Estimate the net depletion resulting from new irrigation development of these lands;
- c) Route the reduced flows through the aquifer and surface flow systems to the affected power plants;
- d) Compute the loss in potential generation at each plant resulting from the reduced flows.

4. Step a) in Finding of Fact No. 3. was accomplished by plotting land location as shown by the water right applications and permits being considered.

5. Step b) in Finding of Fact No. 3. was accomplished using simulation models which have previously established the "base" flows conditions.

6. Step c) in Finding of Fact No. 3. involved a ground water component and a surface water component. Withdrawals from the Snake Plain aquifer and from the tributary valleys affect the water in storage in the aquifer. Storage changes alter the gradients which eventually reduce aquifer discharges. If a new withdrawal is continued long enough, the aquifer outflows will be reduced by an amount approaching the magnitude of the withdrawal and resulting depletion.

7. The IDWR digital model of the Snake Plain aquifer (ground water model) was used to simulate this process and predict the outflow reductions after 15, 30, 45 and 60 years of annual withdrawals by new irrigation development at the assumed locations. The results of the ground water model runs indicate that aquifer outflows for the first 20,000 acres would be reduced by 76 percent of the annual depletion after 60 years. The outflows for the 196,000 acres would be reduced by 87 percent of the average annual depletion after 60 years.

8. Significant reduction should be determined by evaluating the depletion when its effect on the river is fully felt. Incremental change in the percent of annual depletion is very small sixty (60) years after the first depletion. The percent of annual depletion in the 60th year adequately represents the long-term effect of aquifer depletions on Snake River flows.

9. The IDWR routed the reduced flows through the aquifer and river system using a digital model of the Snake River system (river model). This model and its computed base conditions are described in "Stream Flows in the Snake River Basin, 1985 Conditions of Use and Management" Open-File Report, September 1986. The ground water depletion was input to the river model

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assuming uniform depletions each month.

10. The river model computes flows at numerous points in the Snake Plain Basin including sites at, or near to, the power plants. These computed flows were used to compute power generation and were compared to similarly computed generation for base flow conditions.

11. The annual reduction in hydropower generation 60 years after the development of 20,000 new acres is estimated to be approximately 2.8 million KWH in power facilities upstream from the Murphy gage on the Snake River. Comparable reduction for 196,000 acres is approximately 21.9 million kwh.

12. In cooperation with staff of the Idaho Public Utilities Commission (IPUC), IDWR determined the rate impact of lost hydropower generation caused by the new development in the trust water area of the Snake River basin assuming that new thermal generation capacity is obtained to replace the lost hydropower generation.

13. The cost impact to the rate base of replacing the lost hydropower generation with thermal generation capacity must be considered in the evaluation of any significant reduction in hydropower generation, but the statutes and Water Appropriation rules do not require consideration of impacts to the rate base resulting from other aspects of the new development such as new pumping loads.

14. Step d) of Finding of Fact No. 3. was determined using an IPUC power supply model (power model) associated with the ratemaking process. Data from the 1966-1985 period was used to establish a base flow. The depletions were then input to the power model and the difference in ability to meet firm load requirements and to make economic spot market sales and purchases was determined. A comparison of the output of the power model run to base conditions produced increased total IPCO power supply costs due to Snake River depletions.

15. The power model shows that the impact of reduced hydropower generation at IPCO's facilities on the Snake River above the Hell's Canyon complex as a result of the development of 20,000 new acres (after 60 years) will result in an average increase in IPCO's power costs of \$159,553 per year which is approximately five one hundredths of one percent (0.05%). Comparable model results for 196,000 acres show an average power cost increase of \$837,654 per year, or approximately one quarter of one percent (0.25%).

16. During certain periods of each year there generally is unappropriated water in the Snake River. During these periods, a

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new appropriation of water has no effect upon IPCO's water rights or ability to generate hydropower.

CONCLUSIONS OF LAW

1. The development of 196,000 new acres of land will not cumulatively cause a significant reduction in IPCO's hydropower generation capability at hydropower generation facilities upstream from the Hells Canyon complex on the Snake River.

2. The hydropower generating facilities of IPCO which are affected by reductions in river flow represent approximately 25% of IPCO's hydropower generating capacity as compared to the Hells Canyon complex facilities which represent approximately 75% of IPCO's hydropower generating capacity. The Hell's Canyon facilities are subordinated to later in time consumptive uses and are not properly included as a part of the evaluation of significant reduction. (Water Appropriation Rule 5,3,1,4.).

3. The reduction in IPCO's hydropower generation capability caused by new development is such that the timing of the reduction, either on an annual basis or a long term basis, need not be considered by IDWR. The computer model studies show that for the first 20,000 acres, it would take approximately 15 years for aquifer outflow to the Snake River to be reduced 23% of net new withdrawal. By the 60th year outflow would be reduced by 76% of the new depletion. Development of 196,000 acres would reduce outflow by 87% of the new depletions in the 60th year. Other factors present in a dynamic system as large as the Snake Plain aquifer will have more effect on the discharge of the Snake River than decreases caused by this amount of new development.

4. Staff of the IPUC advises that the effect of reduced hydropower production on "unit cost" is not a proper factor to consider when analyzing the effect of reduced flows to hydropower generating facilities. IPUC generally considers hydropower facilities to have zero unit or production costs. Thermal facilities on the other hand do have associated unit costs such as the cost of fuel.

5. The IDWR is unaware of any contract or regulatory permits including FERC licenses which require IPCO to produce or to maintain capability to produce hydropower at specific levels.

6. Approval of applications for permit or permits which propose the development of 196,000 acres of newly irrigated land with water from the Snake Plain aquifer will not either individually or cumulatively cause a significant reduction in the water supply available to the holder of a water right used for power production purposes.

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7. The development proposed by Permit No. 36-7416B will not either individually or cumulatively cause a significant reduction in the water supply available to the holder of a water right used for power production purposes.

8. Permit No. 36-7416B should be continued without special conditions related to Section 42-203C(2), Idaho Code.

ORDER

It is therefore hereby ORDERED as follows:

Permit No. 36-7416B is hereby continued subject to the conditions shown on the continuation order.

Dated this 7TH day of NOVEMBER, 1990.


R. KEITH HIGGINSON
Director

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